

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

|   |   |
|---|---|
| <p>DAKOTA ENERGY COOPERATIVE,<br/>INC.,</p> <p>Plaintiff,</p> <p>v.</p> <p>EAST RIVER ELECTRIC POWER<br/>COOPERATIVE, INC.,</p> <p>Defendant.</p> | <p>Civil Action File No. 4:20-cv-4192</p> <p>_____<br/>(Removed from Third Judicial Circuit<br/>Court, State of South Dakota, County<br/>of Lake, No. 39 CIV. 20-108)</p> |
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**NOTICE OF REMOVAL**

Defendant East River Electric Power Cooperative, Inc. (“East River”) hereby removes the above-captioned action from the Third Judicial Circuit Court, South Dakota, to the United States District Court for the District of South Dakota, Southern Division, pursuant to 28 U.S.C. §§ 1441, 1442, and 1446. Removal is proper on the following grounds:

1. Plaintiff Dakota Energy Cooperative, Inc. (“Dakota Energy”) commenced this action in the Third Judicial Circuit Court of South Dakota by filing a Complaint for Anticipatory Breach of Contract, Declaratory Relief, and Jury Trial Demand (the “Complaint”) against East River. East River was served with a copy of the Summons and Complaint on November 10, 2020.
2. Dakota Energy is a South Dakota electric distribution cooperative with its principal place of business in Beadle County, South Dakota.

3. East River is a South Dakota electric generation and transmission (“G&T”) cooperative with its principal place of business in Lake County, South Dakota. As a G&T, East River delivers wholesale power to Dakota Energy and other electric distribution cooperatives that are members of East River. East River has outstanding loans and loan guarantees with the Rural Utilities Service (“RUS”), an agency of the federal government that finances the construction of electric distribution, generation, and transmission facilities used to provide electric service in rural areas.

4. Dakota Energy is a member of East River and purchases all its power from East River pursuant to a long-term, all-requirements Wholesale Power Contract (“WPC”). The original (1995) WPC between the parties was for a term of 43 years, through December 31, 2038. (Compl. Ex. 2 at 8.) In 2006, the parties extended the term to December 31, 2058, and in 2015, to December 31, 2075. (*Id.* at 31, 34.) Dakota Energy is now seeking to withdraw from East River and terminate the WPC several decades before the contract term expires so that it can buy power elsewhere. In its Complaint, Dakota Energy alleges that East River is wrongfully preventing it from withdrawing from membership in East River and terminating its WPC early, and asserts claims for anticipatory breach of contract and declaratory judgment.

**I. Removal Is Proper Because This Court Has Subject-Matter Jurisdiction Pursuant to the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1).**

5. East River removes this case under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). Removal is proper under 28 U.S.C. § 1442(a) where: “(1) a defendant has acted under the direction of a federal officer, (2) there was a causal

connection between the defendant's actions and the official authority, (3) the defendant has a colorable federal defense to the plaintiff's claims, and (4) the defendant is a 'person,' within the meaning of the statute." *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1230 (8th Cir. 2012). Unlike the analysis to be undertaken with respect to other removal statutes, the federal officer removal statute "must be liberally construed." *Id.* (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007)) (internal punctuation omitted). Because East River satisfies each of the elements of federal officer removal, this action is one over which this Court has removal jurisdiction pursuant to 28 U.S.C. § 1442(a).

6. First, East River satisfies the "acting under" element. The "acting under" requirement involves "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Jacks*, 701 F.3d at 1230 (quoting *Watson*, 551 U.S. at 152). Congress passed the Rural Electrification Act of 1936 ("RE Act") in order to bring electricity to rural areas of the country. *Salt River Project Agric. Improvement & Power Dist. v. Fed. Power Comm'n*, 391 F.2d 470, 473 (D.C. Cir. 1968). "To this end [RUS] makes long-term low-interest loans to approved non-profit cooperatives." *Id.* Through such loans, the federal government "funds its objective of providing rural electricity through . . . cooperatives . . . . These rural electric cooperatives exist to provide a public function conceived of and directed by the federal government." *Caver v. Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1143-44 (11th Cir. 2017) (acknowledging that cooperatives assist RUS "by performing a job that, in the absence of a contract with a private firm, the Government itself would have had to perform" (citation and internal punctuation omitted)). As one court of appeals has stated, "rural electric cooperatives are something

more than public utilities; they are instrumentalities of the United States. They were chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America.” *Ala. Power Co. v. Ala. Elec. Coop., Inc.*, 394 F.2d 672, 677 (5th Cir. 1968) (citation and internal punctuation omitted). Thus, East River, like other electric cooperatives, “helps assist or carry out the duties of RUS and works closely with RUS to fulfill the congressional objective of bringing electricity to rural areas . . . .” *Caver*, 845 F.3d at 1144 (affirming removal under federal officer removal statute). East River thus meets the “acting under” requirement.

7. Second, to satisfy the causal connection requirement, East River must establish a causal relationship between the acts complained of and the federal government. As recognized by the Eighth Circuit, this hurdle is “quite low.” *See Jacks*, 701 F.3d at 1230 & n.3 (quoting *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008)). Pursuant to RUS regulations and long-standing RUS policy, before extending loans and loan guarantees to a G&T (like East River), RUS requires the G&T to enter into long-term, all-requirements contracts with each of its member distribution cooperatives. *See generally Tri-State Generation & Transmission Ass’n v. Shoshone River Power, Inc.*, 805 F.2d 351, 353 (10th Cir. 1986). Such contracts “guarantee a complete payback of the loans.” *Id.* The requirements contracts between a G&T and its member cooperatives “are not simple requirements contracts but rather interdependent, joint and mutual contracts with a common purpose of securing the [RUS] loans and thereby effectuating the [RUS] policy.” *Id.* at 358. Such contracts are “a basic and

important element of the rural electrification system.” *United States v. Sw. Elec. Coop., Inc.*, 663 F. Supp. 538, 543 (S.D. Ill. 1987).

8. In accordance with this policy, RUS required East River to enter into the WPC with Dakota Energy (and similar WPCs with East River’s other member distribution cooperatives) to serve as collateral for RUS loans and loan guarantees and to assure that the purposes of the RE Act are carried out. This is reflected in the East River-Dakota Energy WPC. (*See* Compl. Ex. 2 at 3 (“[T]he Government is relying on this Agreement . . . to assure that the Notes [evidencing the indebtedness created by the loans and loan guarantees] are repaid and the purposes of the Rural Electrification Act of 1936, as amended, are carried out . . . [T]his Agreement and payments due to East River under this Agreement shall be pledged and assigned to secure the Notes.”).)

9. Dakota Energy has sued East River because East River declined Dakota Energy’s request for a buy-out dollar amount that would allow it to withdraw as a member and terminate the WPC decades before the end of the contract term. (*See* Compl. ¶¶ 30, 37.) East River satisfies the causal connection requirement because East River’s challenged conduct—declining a request that would result in termination of a contract required by RUS and pledged as security for repayment of RUS loans and loan guarantees—relates to acts taken under color of federal office, including long-standing RUS policy, RUS regulations, and the provisions of RUS and RUS-approved contracts. Additionally, East River’s challenged conduct relates to acts taken under the terms of its loan contract with RUS, which obligates East River, among other things, not to take any action that would materially impair the value of any WPC. Allowing Dakota Energy to

terminate the WPC and its ongoing payment obligations thereunder would have been contrary to East River's contractual commitments to RUS. Thus, East River meets the "low hurdle" causal connection requirement.

10. Third, East River satisfies the colorable federal defense element of 28 U.S.C. § 1442(a)(1). "In construing the colorable federal defense requirement, we have rejected a 'narrow, grudging interpretation' of the statute. . . . We therefore do not require the officer virtually to 'win his case before he can have it removed.'" *Jefferson Cty. v. Acker*, 527 U.S. 423, 431 (1999) (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969)); *see also United States v. Todd*, 245 F.3d 691, 693 (8th Cir. 2001) ("For a [federal] defense to be considered colorable, it need only be plausible; § 1442(a)(1) does not require a court to hold that a defense will be successful before removal is appropriate."). East River has a colorable defense of preemption. The issues in this case will necessarily involve federal statutes and regulations applicable to cooperatives, like East River, that have outstanding loans and loan guarantees with RUS. Furthermore, Dakota Energy alleges that in not permitting it to terminate the WPC early, East River violated South Dakota law. (Compl. ¶¶ 30, 37.) Thus, East River is faced with the impossibility of complying with RUS regulations, policy, and contractual covenants while also complying with South Dakota law as Dakota Energy interprets it. Additionally, South Dakota law as asserted by Dakota Energy poses an obstacle to the accomplishment of congressional objectives as set forth in the RE Act, RUS regulations, the RUS-required WPC, and the provisions of East River's loan contract with RUS. East River also has a colorable defense of official justification: it should not be subject to

liability for carrying out long-standing RUS policies and goals and complying with the terms of its contract with RUS. Thus, East River satisfies the colorable federal defense element.

11. Finally, East River is a “person” for purposes of 28 U.S.C. § 1442(a). *Jacks*, 701 F.3d at 1230 n.3 (recognizing that “person” contemplated by statute includes corporations).

## **II. All Procedural Requirements for Removal Have Been Satisfied.**

12. This Notice of Removal was filed within 30 days after November 10, 2020, the date of service on East River of a copy of the initial pleading setting forth the claim for relief upon which this action is based, and is therefore timely under 28 U.S.C. § 1446(b).

13. Jurisdiction is founded on the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which grants federal courts jurisdiction over suits against a person acting under a federal officer.

14. Venue is proper in this Court because the Third Judicial Circuit Court of South Dakota is located within the District of South Dakota, Southern Division. *See* 28 U.S.C. § 1441(a).

15. Pursuant to 28 U.S.C. § 1446(a), copies of the Complaint and all other process, pleadings, and orders served upon East River to date are attached hereto as Exhibit A.

16. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon counsel for Dakota Energy. A copy is also being filed with the Clerk of Court, Third Judicial Circuit Court, South Dakota.

17. This Notice of Removal is signed pursuant to Rule 11 of the Federal Rules of Civil Procedure.

Dated December 7, 2020.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

/s/ Dana Van Beek Palmer

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*Attorneys for Defendant East River Electric Power  
Cooperative, Inc.*



**CERTIFICATE OF SERVICE**

This is to certify that on December 7, 2020, a copy of the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system in the United States District Court for the District of South Dakota, and copies were served on the following attorneys of record by electronic mail:

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/s/ Dana Van Beek Palmer  
Dana Van Beek Palmer

JS 44 (Rev. 10/20)

**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**

DAKOTA ENERGY COOPERATIVE, INC.

(b) County of Residence of First Listed Plaintiff Beadle County, SD  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

See attachment.

**DEFENDANTS**

EAST RIVER ELECTRIC POWER COOPERATIVE, INC.

County of Residence of First Listed Defendant Lake County, SD  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

See attachment.

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- (For Diversity Cases Only)
- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)Click here for: [Nature of Suit Code Descriptions.](#)

| CONTRACT   | TORTS  | FORFEITURE/PENALTY   | BANKRUPTCY  | OTHER STATUTES   |   |
|--|--|--|---|--|---|
| <input type="checkbox"/> 110 Insurance<br><input type="checkbox"/> 120 Marine<br><input type="checkbox"/> 130 Miller Act<br><input type="checkbox"/> 140 Negotiable Instrument<br><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment<br><input type="checkbox"/> 151 Medicare Act<br><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans)<br><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits<br><input type="checkbox"/> 160 Stockholders' Suits<br><input checked="" type="checkbox"/> 190 Other Contract<br><input type="checkbox"/> 195 Contract Product Liability<br><input type="checkbox"/> 196 Franchise | <b>PERSONAL INJURY</b><br><input type="checkbox"/> 310 Airplane<br><input type="checkbox"/> 315 Airplane Product Liability<br><input type="checkbox"/> 320 Assault, Libel & Slander<br><input type="checkbox"/> 330 Federal Employers' Liability<br><input type="checkbox"/> 340 Marine<br><input type="checkbox"/> 345 Marine Product Liability<br><input type="checkbox"/> 350 Motor Vehicle<br><input type="checkbox"/> 355 Motor Vehicle Product Liability<br><input type="checkbox"/> 360 Other Personal Injury<br><input type="checkbox"/> 362 Personal Injury - Medical Malpractice | <b>PERSONAL INJURY</b><br><input type="checkbox"/> 365 Personal Injury - Product Liability<br><input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability<br><input type="checkbox"/> 368 Asbestos Personal Injury Product Liability<br><b>PERSONAL PROPERTY</b><br><input type="checkbox"/> 370 Other Fraud<br><input type="checkbox"/> 371 Truth in Lending<br><input type="checkbox"/> 380 Other Personal Property Damage<br><input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881<br><input type="checkbox"/> 690 Other<br><b>LABOR</b><br><input type="checkbox"/> 710 Fair Labor Standards Act<br><input type="checkbox"/> 720 Labor/Management Relations<br><input type="checkbox"/> 740 Railway Labor Act<br><input type="checkbox"/> 751 Family and Medical Leave Act<br><input type="checkbox"/> 790 Other Labor Litigation<br><input type="checkbox"/> 791 Employee Retirement Income Security Act<br><b>IMMIGRATION</b><br><input type="checkbox"/> 462 Naturalization Application<br><input type="checkbox"/> 465 Other Immigration Actions | <input type="checkbox"/> 422 Appeal 28 USC 158<br><input type="checkbox"/> 423 Withdrawal 28 USC 157<br><b>PROPERTY RIGHTS</b><br><input type="checkbox"/> 820 Copyrights<br><input type="checkbox"/> 830 Patent<br><input type="checkbox"/> 835 Patent - Abbreviated New Drug Application<br><input type="checkbox"/> 840 Trademark<br><input type="checkbox"/> 880 Defend Trade Secrets Act of 2016<br><b>SOCIAL SECURITY</b><br><input type="checkbox"/> 861 HIA (1395ff)<br><input type="checkbox"/> 862 Black Lung (923)<br><input type="checkbox"/> 863 DIWC/DIWW (405(g))<br><input type="checkbox"/> 864 SSID Title XVI<br><input type="checkbox"/> 865 RSI (405(g))<br><b>FEDERAL TAX SUITS</b><br><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)<br><input type="checkbox"/> 871 IRS—Third Party 26 USC 7609 | <input type="checkbox"/> 375 False Claims Act<br><input type="checkbox"/> 376 Qui Tam (31 USC 3729(a))<br><input type="checkbox"/> 400 State Reapportionment<br><input type="checkbox"/> 410 Antitrust<br><input type="checkbox"/> 430 Banks and Banking<br><input type="checkbox"/> 450 Commerce<br><input type="checkbox"/> 460 Deportation<br><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations<br><input type="checkbox"/> 480 Consumer Credit (15 USC 1681 or 1692)<br><input type="checkbox"/> 485 Telephone Consumer Protection Act<br><input type="checkbox"/> 490 Cable/Sat TV<br><input type="checkbox"/> 850 Securities/Commodities/Exchange<br><input type="checkbox"/> 890 Other Statutory Actions<br><input type="checkbox"/> 891 Agricultural Acts<br><input type="checkbox"/> 893 Environmental Matters<br><input type="checkbox"/> 895 Freedom of Information Act<br><input type="checkbox"/> 896 Arbitration<br><input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision<br><input type="checkbox"/> 950 Constitutionality of State Statutes |
| <b>REAL PROPERTY</b><br><input type="checkbox"/> 210 Land Condemnation<br><input type="checkbox"/> 220 Foreclosure<br><input type="checkbox"/> 230 Rent Lease & Ejectment<br><input type="checkbox"/> 240 Torts to Land<br><input type="checkbox"/> 245 Tort Product Liability<br><input type="checkbox"/> 290 All Other Real Property   | <b>CIVIL RIGHTS</b><br><input type="checkbox"/> 440 Other Civil Rights<br><input type="checkbox"/> 441 Voting<br><input type="checkbox"/> 442 Employment<br><input type="checkbox"/> 443 Housing/Accommodations<br><input type="checkbox"/> 445 Amer. w/Disabilities - Employment<br><input type="checkbox"/> 446 Amer. w/Disabilities - Other<br><input type="checkbox"/> 448 Education   | <b>PRISONER PETITIONS</b><br><b>Habeas Corpus:</b><br><input type="checkbox"/> 463 Alien Detainee<br><input type="checkbox"/> 510 Motions to Vacate Sentence<br><input type="checkbox"/> 530 General<br><input type="checkbox"/> 535 Death Penalty<br><b>Other:</b><br><input type="checkbox"/> 540 Mandamus & Other<br><input type="checkbox"/> 550 Civil Rights<br><input type="checkbox"/> 555 Prison Condition<br><input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement                                |   |  |   |

**V. ORIGIN** (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding
- ☒ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation - Transfer
- ☐ 8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
28 U.S.C. § 1442(a)

Brief description of cause:

Breach of contract arising from attempt to terminate cooperative's long-term, all requirements power contract

**VII. REQUESTED IN COMPLAINT:**☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE

DOCKET NUMBER

DATE

December 7, 2020

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

**ATTACHMENT TO CIVIL COVER SHEET**

*Dakota Energy Cooperative, Inc.*

v.

*East River Electric Power Cooperative, Inc.*

**I. Attorneys**

| <u>Attorneys for Plaintiff:</u>  | <u>Attorneys for Defendant:</u>  |
|--|--|
| <p>Lee Schoenbeck<br/>Joseph Erickson<br/>SCHOENBECK LAW, PC<br/>P.O. Box 1325<br/>Redlin Art Center<br/>1200 Mickelson Dr., #310<br/>Watertown, SD 57201<br/>Telephone: (605) 886-0010<br/>Facsimile: (605) 886-0011<br/>lee@schoenbecklaw.com<br/>joe@schoenbecklaw.com</p> <p>-----</p>   | <p>Michael L. Luce<br/>R. Alan Peterson<br/>Dana Van Beek Palmer<br/>LYNN, JACKSON, SHULTZ &amp; LEBRUN, P.C.<br/>110 N. Minnesota Avenue, Suite 400<br/>Sioux Falls, SD 57104<br/>Telephone: (605) 332-5999<br/>Facsimile: (605) 332-4249<br/>mluce@lynnjackson.com<br/>rpeterson@lynnjackson.com<br/>dpalmer@lynnjackson.com</p> <p>-----</p>  |
| <p>Peter W. Herzog III<br/>                    (<i>pro hac vice</i> to be submitted)<br/>Joel S. Neckers<br/>                    (<i>pro hac vice</i> to be submitted)<br/>Michele O. Choe<br/>                    (<i>pro hac vice</i> to be submitted)<br/>WHEELER TRIGG O'DONNELL LLP<br/>370 Seventeenth Street, Suite 4500<br/>Denver, CO 80202<br/>Telephone: (303) 244-1800<br/>Facsimile: (303) 244-1879<br/>pherzog@wtotrial.com<br/>neckers@wtotrial.com<br/>choe@wtotrial.com</p> | <p>James A. Orr<br/>                    (<i>pro hac vice</i> to be submitted)<br/>Tracey K. Ledbetter<br/>                    (<i>pro hac vice</i> to be submitted)<br/>EVERSHEDS SUTHERLAND (US) LLP<br/>999 Peachtree Street, NE, Suite 2300<br/>Atlanta, GA 30309-3996<br/>Telephone: (404) 853-8000<br/>Facsimile: (404) 853-8806<br/>jamesorr@eversheds-sutherland.com<br/>traceyledbetter@eversheds-sutherland.com</p> |